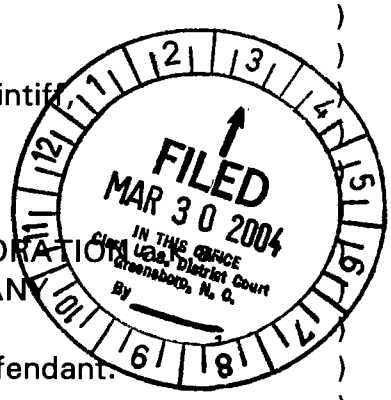
18.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WILLIE D. GREEN,)
)
Plaintiff,)
)
v.) 1:03CV264
)
DUKE ENERGY CORPORATION;)
DUKE POWER COMPANY)
)
Defendant.)
)



MEMORANDUM OPINION

TILLEY, Chief Judge

This matter is before the Court on Defendant's Motion for Summary Judgment [Doc. #13]. For the reasons set forth below, Defendant's Motion will be GRANTED, and Plaintiff's Complaint will be dismissed.

I.

The facts viewed in the light most favorable to the Plaintiff are as follows: Willie D. Green is a 52-year-old[1] African-American male who has been employed by Defendant Duke Energy Corporation ("Duke") since 1973. Since 1978, Mr. Green has worked in the Instrumentation and Controls (ICE) Department at Duke's Belews Creek Steam Station as a fossil technician. Mr. Green progressed through the various pay grades for fossil technicians until earning the highest wage available for that position.

[1]Mr. Green's date of birth is January 14, 1952.

In November 2001, the Production Team Leader (PTL) supervisory position in the ICE Department became available, and a notice was posted on Duke's internal job broadcast system. Keith Queen, Production Manager for Duke, was in charge of the hiring process for this position, and would be the direct supervisor of the person hired to fill the position.[2] Mr. Green, along with eleven other company employees, applied for the PTL position. Of the twelve total applicants, two were African-American (Mr. Green and one other applicant), and ten were Caucasian.

At one point, Duke's policy had been to automatically promote the most senior employee within the ICE Department when the PTL position became available. However, this policy was discontinued years before the events relevant to this action occurred. In his affidavit, Mr. Green stated that he felt he would be hired for the PTL position because he was the most senior technician. However, at least three separate times during Mr. Green's deposition he clearly stated that Duke's policy of automatic promotions based on seniority had changed prior to his application for the PTL position. (Green Dep. at 62-65, 245, 333-34.)[3] Therefore, it is treated as uncontested that Duke's former promotion policy based solely on

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[2]Mr. Queen had worked for Duke for several years, but had had no direct supervision over Mr. Green. Therefore, Mr. Queen had little first-hand knowledge of Mr. Green's work skills and experience.

[3]Mr. Green also stated that he did not think the decision to change the policy was related to his race. (Green Dep. at 334.)

seniority was no longer in place during the time frame relevant to this action.[4] Instead, Duke based promotions on a determination of who was the most qualified for the position. Specifically, in filling the PTL position, Mr. Queen used a procedure that had been employed in filling other positions at Duke.

This procedure involved the following steps. First, Mr. Queen reviewed the job interest forms submitted by the candidates to determine which met the minimum qualifications for the PTL position. Those that met the minimum qualifications were interviewed and asked a series of questions related to the minimum and desired qualifications for the position, in addition to some supplemental questions. Then Mr. Queen gave each applicant a numerical rating for every minimum and desired job qualification. The applicants' numerical scores were added, and the three candidates with the highest cumulative score were considered further. Mr. Queen reviewed the recent written performance appraisals for these top three candidates to make sure there was nothing that would impact the decision.

In this case, Mr. Green did meet the minimum qualifications of the position,

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[4]A plaintiff may not survive a motion for summary judgment by submitting an affidavit that directly contradicts prior deposition testimony. Rohrbough v. Wyeth Lab, 916 F.2d 970, 974-75 (4th Cir. 1990) (citing Barwick v. Celotex Corp., 736 F.2d 946, 960 (4th Cir. 1984) (holding that "[a] genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct")).

and was interviewed by Mr. Queen.[5] However, after numerical ratings were assigned and cumulated, the top three candidates did not include Mr. Green. They were Thomas Gore, Scott Trombley, and Roger Redd (the other African-American applicant). Mr. Green was the sixth candidate on the list.

Mr. Queen's review of the performance appraisals revealed nothing that impacted his decision, and therefore, the candidate with the highest score, Mr. Gore, was selected to fill the PTL position. Before officially hiring Mr. Gore, Mr. Queen discussed his process and choice with Human Resources Consultant, Millie Priddy, and Plant Manager, Tom Guthrie. Mr. Guthrie had the authority to override Mr. Queen's decision, however, he agreed with Mr. Queen's process and did not elect to override his decision. Therefore, Mr. Gore was hired to fill the PTL position. Mr. Gore is younger and less senior than Mr. Green, and is Caucasian. Specifically, Mr. Gore was under the age of forty at the time of his application.

After the selection decision was announced, Mr. Queen met individually with each applicant to provide feedback regarding their performance during the application process. The meeting with Mr. Green occurred on March 4, 2002.

Mr. Green had been rated lower than Mr. Gore in several minimum job qualifications: (1) demonstrated safe work practices, (2) demonstrated effective verbal and written communication skills, (3) demonstrated computer skills using

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[5]Mr. Queen has testified that Mr. Green is a very capable technician, and has never received any formal, corrective action during his tenure at Duke.

Lotus notes, Windows, Excel, WMS, and (4) demonstrated support of company/department policies regarding safety, environmental leadership, convert energy process, and the Duke Energy Code of Business Conduct. Mr. Green was ranked lower than Mr. Gore in one desired job qualification: training specific to business principles applicable to power generation.

Mr. Queen provided explanations for each of the above rankings, several of which were described to Mr. Green during the March 4, 2002 meeting. Also during this meeting Mr. Green told Mr. Queen that he felt he had not been selected for the PTL position because of his race, and described an incident years before regarding the "time earned/not worked" procedures where he felt he had been singled-out and treated unfairly. Mr. Queen pointed out that at least three other Duke employees had been subject to the same issue since Mr. Queen's arrival at Duke in 2000. Mr. Queen denied that discrimination had played any role in his decision process and suggested that Mr. Green communicate his concerns to Human Resources.

Mr. Green subsequently expressed his concerns that he had been discriminated against based on his race and age to Mr. Guthrie, the next level of management above Mr. Queen. Mr. Green described several incidents at work where he felt he had been singled-out dating back to the 1970s. Mr. Guthrie denied that any discrimination had occurred, and reviewed the hiring process that had been used. Mr. Green then filed a complaint through Duke's internal recourse

process. Duke investigated Mr. Green's concerns, and ultimately upheld Mr. Queen's decision to hire Mr. Gore for the PTL position.

On July 12, 2002, Mr. Green filed a charge against Duke with the Equal Employment Opportunity Commission (EEOC) alleging that he was denied promotion because of his race and age. On January 9, 2003, the EEOC dismissed Mr. Green's charge and issued him a right-to-sue letter.

On March 20, 2003, Plaintiff Mr. Green brought suit against Duke in the Middle District of North Carolina. [Doc. #1]. The Complaint asserts several claims arising from Duke's failure to promote Mr. Green to a supervisory position: (1) race discrimination and racially hostile work environment pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. ("Title VII"), 42 U.S.C. § 1981, and the North Carolina Equal Employment Practices Act, N.C. Gen. Stat. § 143-422.2 ("NCEEPA"); (2) age discrimination pursuant to the Age Discrimination and Employment Act of 1967, 42 U.S.C. §§ 621, et seq. ("ADEA"); and (3) negligent supervision and retention under North Carolina common law.

On December 31, 2003, Duke filed a Motion for Summary Judgment [Doc. #13] alleging that there is no genuine issue as to any material fact and that Duke is entitled to judgment as a matter of law as to all claims asserted by Mr. Green. For the reasons provided below, Duke's Motion for Summary Judgment will be GRANTED and the Complaint will be dismissed.

II.

Summary judgment is proper only when there is no genuine issue of any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(e). The material facts are those identified by controlling law as essential elements of claims asserted by the parties. In other words, the materiality of a fact depends on whether the existence of the fact could cause a jury to reach different outcomes. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Cox v. County of Prince William, 249 F.3d 295, 299 (4th Cir. 2001). An issue is genuine as to such facts if the evidence is sufficient for a reasonable trier of fact to find in favor of the nonmoving party. Anderson, 477 U.S. at 248. No genuine issue of material fact exists if the nonmoving party fails to make a sufficient showing on an essential element of its case as to which it would have the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

In evaluating a motion for summary judgment, the court must view the facts and inferences reasonably to be drawn from them in the light most favorable to the nonmoving party. See Fed. R. Civ. P. 56(e). Summary judgment requires a determination of the sufficiency of the evidence, not a weighing of the evidence. Anderson, 477 U.S. at 249. In essence, the analysis concerns "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52. Trial is unnecessary if "the facts are undisputed, or if disputed, the

dispute is of no consequence to the dispositive question." Mitchell v. Data General Corp., 12 F.3d 1310, 1315-16 (4th Cir. 1993).

III.

For the reasons stated below, Duke's Motion for Summary Judgment will be GRANTED in full.

A.

Mr. Green's Complaint alleges several claims; however, only the claims for intentional discrimination (failure to promote) based on race and age pursuant to Title VII and the ADEA are addressed in depth below. In Mr. Green's Brief in Opposition to Summary Judgment, he expressly concedes that because the harassment claim "may not rise to the level sufficient to withstand summary judgment" he will direct his arguments towards the "claims of race and age discrimination with regard to defendant's failure to promote . . . ." (Pl.'s Resp. Summ. J. at 4, n.1.) Further, Mr. Green does not respond at all to Duke's arguments that summary judgment should be entered for the claims for pattern or practice of discrimination, negligent supervision and retention, and failure to promote under NCEEPA. Therefore, the motion for summary judgment is considered uncontested as to all claims except the failure-to-promote claims pursuant to Title VII and the ADEA.

An uncontested motion for summary judgment is not automatically granted. Campbell v. Hewitt, Coleman & Assocs., Inc., 21 F.3d 52, 55 (4th Cir. 1994).

The moving party's facts are deemed uncontroverted, and the court determines whether the moving party is entitled to judgment as a matter of law. Custer v. Pan Am. Life Ins. Co., 12 F.3d 410, 416 (4th Cir. 1993). Because Duke's facts do not establish that Mr. Green is entitled to judgment as a matter of law with respect to the claims listed above, summary judgment as to these claims will be GRANTED. The motion for summary judgment is contested as to the failure-to-promote discrimination claims, based on race and age. These claims are discussed below.

B.

1.

Title VII prohibits employers from denying a promotion to an employee because of that employee's race.[6] In order to prove racial discrimination in violation of Title VII, a plaintiff may provide direct evidence of discrimination or proceed under the burden-shifting proof scheme established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under the McDonnell Douglas test, if the plaintiff establishes a prima facie case, she raises a presumption of discrimination. However, once the employer offers a legitimate,

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[6]Mr. Green's Complaint also asserts a claim of race discrimination under § 1981. Section 1981 prohibits racial discrimination in the making of private contracts, and has been interpreted to protect employees from race discrimination in the workplace. Spriggs v. Diamond Auto Glass, 165 F.3d 1015, 1018-19 (4th Cir. 1999). The requirements of a racial discrimination claim are the same under § 1981 as under Title VII. Candillo v. N.C. Dep't of Corrections, 199 F. Supp. 2d 342, 354 (M.D.N.C. 2002). Thus, the § 1981 claim will not be addressed separately.

nondiscriminatory reason for not promoting the plaintiff, the presumption of discrimination drops from the case and the plaintiff bears the burden of demonstrating that the defendant's explanation is pretextual. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). In the context of summary judgment, if a plaintiff fails to raise a genuine factual dispute concerning the employer's non-discriminatory explanation for the alleged discriminatory act, the defendant is entitled to summary judgment. Henson v. Liggett Group, Inc., 61 F.3d 270, 274 (4th Cir. 1995). In raising a genuine factual dispute, a scintilla of evidence in favor of the plaintiff's position is not enough; evidence from which a jury could reasonably find for the plaintiff is required. Id. (citations omitted).

To establish a prima facie case of racial discrimination in a failure to promote claim, the plaintiff must show that: (1) he is a member of a protected class; (2) he applied for the position; (3) he was qualified for the position; and (4) he was rejected for the position under circumstances giving rise to an inference of discrimination. Carter v. Ball, 33 F.3d 450, 458 (4th Cir. 1994). To satisfy the fourth requirement, a plaintiff need only show that the position was filled by an individual that is not a member of the protected class claimed by the plaintiff. Id. The Fourth Circuit has recognized that establishing a prima facie case for a discrimination claim is a "relatively easy test." Young v. Lehman, 748 F.2d 194, 197 (4th Cir. 1984).

An employer may rebut a plaintiff's prima facie case by demonstrating that

the person promoted was better qualified for the position than was the plaintiff. Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126, 1129 (4th Cir. 1995). When evaluating qualifications, an employer may consider objective factors such as performance records and years of experience, along with subjective factors such as interpersonal and leadership skills. Id. at 1130. Further, an employer may exercise its discretion to select among equally qualified candidates for a position, as long as no unlawful criteria are considered. Evans v. Tech. Applications & Serv. Co., 80 F.3d 954, 959-60 (4th Cir. 1996). The employer's perception is what matters, not the employee's self-assessment of his qualifications. Id. at 960.

2.

Here, Mr. Green has no direct evidence that he was denied the PTL position because of his race, and therefore his claim must proceed under the McDonnell Douglas burden-shifting proof scheme. Duke concedes that, for purposes of summary judgment, Mr. Green can meet the first three requirements of the prima facie case, but argues that he has proffered no evidence that he was rejected for the PTL position under circumstances giving rise to an inference of discrimination. However, the undisputed facts show that the position was filled by Mr. Gore, a Caucasian man. Therefore, the position was filled by an individual outside the protected class at issue, and Mr. Green can meet the fourth requirement of a prima facie case. Therefore, Mr. Green has established a prima facie case, and Duke's offered explanations for why it did not hire Mr. Green must be examined.

Duke has articulated a legitimate, non-discriminatory reason for its failure to promote Mr. Green. Specifically, it has provided substantial evidence that, according to its evaluation, Mr. Gore was the more qualified candidate for the PTL position. Some examples include Mr. Queen's testimony that, relative to Mr. Green, Mr. Gore possessed superior oral and written communication skills, had more extensive experience in workplace safety, and had submitted more complete information on his application form.

In response, Mr. Green has failed to raise a factual issue as to whether Duke's offered reason is pretext. Mr. Green's own assertions that he was more qualified than Mr. Gore are immaterial. See Evans, 80 F.3d at 960 (plaintiff's "unsubstantiated allegations and bald assertions concerning her own qualifications and the shortcomings of her co-workers fail to disprove [the defendant's] explanation or show discrimination"). Further, Mr. Green has provided no evidence suggesting that racial animus was the true reason for Duke's decision. In fact, Mr. Green himself testified that he does not think that Mr. Queen was dishonest in describing the reasons for his selection of Mr. Gore to fill the PTL position. (Green Dep. at 352.) Even viewing the facts in the light most favorable to Mr. Green, he has failed to proffer evidence from which a reasonable jury could find that Duke's offered reason is mere pretext. Therefore, Duke's Motion for Summary Judgment will be GRANTED as to Mr. Green's claims of race discrimination pursuant to Title VII and § 1981.

C.

For reasons analogous to those stated above, Duke's Motion for Summary Judgment will be GRANTED as to Mr. Green's claims of age discrimination pursuant to the ADEA. The McDonnell Douglas proof scheme developed for Title VII claims is also used for claims brought under the ADEA. Henson v. Liggett Group, Inc., 61 F.3d 270, 274 (4th Cir. 1995). For purposes of summary judgment, Mr. Green can show a prima facie case of age discrimination under the ADEA. However, as with his race claim, Mr. Green has failed to raise a factual issue as to whether Duke's explanation is pretextual.

Mr. Green has proffered very limited evidence related to age. Specifically, he provides anecdotal evidence of other employees he feels were denied promotions due to their age, and he describes a comment made by Mike Olive, a former Production Manager and predecessor to Mr. Queen, years before the events at issue. Mr. Green testified that Mr. Olive stated at an unspecified time that Duke would want whoever was selected to be the next PTL to remain in the position for at least seven to eight years. Mr. Green states that, after this remark was made, Frank Hepler, a fellow technician, stated that Mr. Olive must have meant that Mr. Green would not be considered. Mr. Green's interpretation of these remarks was that he was considered too old to be eligible for the PTL position.

As described in the above section addressing the race claim, Duke's offered explanation for its decision to promote Mr. Gore and not Mr. Green to the PTL

position is that Mr. Gore was more qualified than Mr. Green. Mr. Green has provided no evidence from which a reasonable jury could find that Duke's offered explanation is mere pretext masking a discriminatory intent based on age. The comment attributed to Mr. Olive is irrelevant to the events at issue–the comment was made years before Mr. Green applied for the PTL position, and is no more than a stray remark. Neither the comment nor the anecdotal evidence raise a factual issue as to whether Mr. Green was actually more qualified than Mr. Gore for the PTL position. Therefore, Duke's Motion for Summary Judgment will be GRANTED as to Mr. Green's claims of age discrimination pursuant to the ADEA.

IV.

In conclusion, while meeting the requirements of prima facie cases of race and age discrimination, Mr. Green has not met his burden for either claim under the McDonnell Douglas proof scheme to raise a factual issue as to whether Duke's offered explanation is pretextual. Thus, Duke's Motion for Summary Judgment [Doc. #13] will be GRANTED, and Mr. Green's Complaint will be dismissed.

This 30th day of March, 2004

United States District Judge